Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Billed Party Preference for InterLATA 0+ Calls	)	CC Docket No. 92-77

COMMENTS OF ONCOR COMMUNICATIONS, INC. ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

ONCOR COMMUNICATIONS, INC.

Mitchell F. Brecher

FLEISCHMAN AND WALSH, L.L.P
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 939-7900

Its Attorneys

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TABLE OF CONTENTS

SUMMARY

Oncor Communications, Inc. opposes the Commission's proposal to establish rate caps (which the Commission calls rate "benchmarks") for operator-assisted (0+) calls based upon "consumer expectations" and to require carriers whose rates exceed those "benchmarks" to make rate disclosure announcements. Common carriers have a right to charge rates which are just and reasonable and not unreasonably discriminatory, and in determining the lawfulness of rates, cost of service, not someone's perception of consumer "expectations" has long been the benchmark. Under the rate "benchmark" proposal, the Commission would be competitively disadvantaging -- even punishing -- carriers whose rates are based on costs and are lawful, but which exceed what the Commission perceives that some consumers expect to pay.

The rate benchmark proposal disregards sixteen years of Commission policy that non-dominant carriers' rates are presumptively lawful -- a policy based in part on the Commission's recognition that non-dominant carriers do not have captive customers and that competitive alternatives are readily available. The high incidence of "dial around" calling resulting from the requirements of the Telephone Operator Consumer Services Improvement Act, the Commission's rules and policies, and aggressive marketing and customer education efforts of major carriers has shown that carriers offering operator services are truly non-dominant. Moreover, the proposed rate disclosure requirement would exceed the Commission's remedial authority under TOCSIA.

Ironically, the proposal to base the rate "benchmarks" on the rates of the three leading operator service providers -- all of whom are considered to be non-dominant -- would result in three companies whose rates are virtually unregulated becoming the *de facto* rate regulators of

500 other companies, the totality of which comprise a minuscule market share.

In addition to being bad public policy, mandatory rate disclosures would constitute mandated commercial speech in violation of the First Amendment. The Commission may not constitutionally compel companies to speak when they would prefer not to except when necessary to avoid public deception or to serve some other substantial governmental interest. Neither of these tests are met.

If the Commission requires any announcements, the requirement should be only that carriers announce that rates are available upon request, and that the requirement be made applicable to all providers of 0+ services, irrespective of rates.

Finally, Oncor concurs with the Commission's suggestion that informational tariffs no longer are necessary, and that the Commission has authority both under Section 10 and Section 226 of the Communications Act to discontinue requiring the filing of informational tariffs. However, the Commission should recognize that a consequence of its proposal to establish a system of rate "benchmarks" based on the 0+ rates of the "Big 3" carriers would be the continued necessity for those carriers to offer their 0+ services pursuant to filed tariffs.

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Oncor Communications, Inc. ("Oncor"), by its attorneys, hereby submits its initial comments on the Commission's Second Further Notice of Proposed Rulemaking issued in this proceeding.[1]

INTRODUCTION

Oncor is an interexchange telecommunications carrier whose services include provision of operator-assisted calling (sometimes referred to as 0+ calling) from public telephones, primarily public telephones owned by Bell Operating Companies (BOCs) and other local exchange carriers. As a provider of 0+ services, Oncor will be profoundly impacted by whatever action the Commission takes in this proceeding.

With the issuance of this Second Further Notice, the Commission has proposed to adopt a system of rate caps or rate "benchmarks" to be applicable to operator-assisted calls (sometimes called "0+ calls") from public telephones. Billed party preference was first proposed by the Commission in 1992,[2] and was the subject of a second notice of proposed rulemaking in 1994,[3]

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[1]Billed Party Preference for InterLATA 0+ Calls (*Second Further Notice of Proposed Rulemaking*), FCC 96-253, released June 6, 1996 ("Second Further Notice").

[2]Billed Party Preference for 0+ InterLATA Calls (*Notice of Proposed Rulemaking*), 7 FCC Rcd 3027 (1992).

and additional comments on that notice. The record established in the earlier stages of this docket provides ample evidence that billed party preference would be extremely expensive -- costing between one billion and two billion dollars to implement, that irrespective of cost billed party preference could not be implemented in a manner which would result in numerous important categories of calls being routed to the billed parties' preferred carriers, and that it would have relatively little impact on the routing of interexchange calls since a majority of public phones are presubscribed to the same carrier which is the preferred carrier for a substantial majority of billed parties. Further, since the mandatory access requirements of the Telephone Operator Consumer Services Improvement Act (TOCSIA)[4] and the Commission's rules have led to the rapid proliferation of dial-around calling by consumers to reach their preferred carriers, any need for a government-mandated means for automatically routing calls to billed parties' preferred carriers rather than the premises owner's presubscribed carrier has dissipated.[5]

In the Second Further Notice, the Commission has proposed the establishment of maximum rate levels to be charged for 0+ calls based on "consumers' expectations."[6] Carriers whose rates exceed those consumer expectation-based levels would be required to announce at

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[3]Billed Party Preference for 0+ InterLATA Calls (*Further Notice of Proposed Rulemaking*), 9 FCC Rcd 3320 (1994).

[4]47 U.S.C. § 226.

[5]As noted by Oncor in its reply comments on the Further Notice of Proposed Rulemaking in this proceeding, as of 1994 "dial-around" rates from public telephones were as high as sixty-six percent, and, based upon projected increases in dial-around, by 1997 the dial-around rates could be as high as seventy-five to eighty percent or higher. See Reply Comments of Oncor, submitted September 14, 1994 at 15.

[6]Second Further Notice, *supra* at ¶ 23.

the outset of each call before charges are incurred what the charges for the call will be.[7] Carriers whose rates for 0+ calls do not exceed those levels based upon consumer expectations would not be subject to any rate disclosure requirement.

As an alternative to its rate "benchmark"/rate disclosure proposal, the Commission proposes requiring rate disclosure for all 0+ calls, irrespective of rate levels. In addition, the Commission offers two proposals regarding the filing of operator service providers' informational tariffs. First, it proposes to exercise its statutory authority to forbear from continuing to require the filing of informational tariffs.[8] Second, it proposes that, if informational tariffs are to be filed, they must contain specific and discernible rates rather than ranges of rates.[9]

As will be explained in detail in these comments, Oncor opposes the establishment of rate benchmarks and a rate disclosure requirement based upon such benchmarks. For the Commission to dictate carrier prices in a competitive market based on some indefinite perception of "consumer expectations" is bad public policy. It would achieve no public interest benefit and is thoroughly antithetical to the overall regulatory philosophy of the Commission and the pro-competitive deregulatory goals which underlie the recently-enacted Telecommunications Act of 1996.[10] Moreover, it is doubtful whether such a mandated speech requirement would comply with the First Amendment. If the Commission elects to proceed with rate disclosure requirements notwithstanding the fact that such requirements are constitutionally questionable,

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[7]*Id.* at ¶ 35.

[8]*Id.* at ¶ 40.

[9]Id. at ¶ 47.

[10]Pub. L. No. 104-104, 110 Stat. 56 (enacted February 8, 1996).

then Oncor recommends that the Commission require that all providers of 0+ services make rate availability announcements for all 0+ calls. Finally, Oncor will explain why implementation of the Commission's rate cap proposal could effectively preclude the application of tariff forbearance to operator service tariffs.

I. Mandatory Rate Disclosure Announcements Based Upon Consumer Expectations Would Violate the Communications Act and Contravene Commission Policy

Under the Communications Act of 1934, as amended,[11] charges for common carrier services must be just and reasonable,[12] and may not be unreasonably discriminatory.[13] In determining the lawfulness of rates under Sections 201(b) and 202(a) of the Act, the Commission has long considered cost of service as a benchmark.[14] In some circumstances, the Commission has allowed rates to be based upon certain non-cost factors such as competitive necessity.[15] Never has the Commission determined the lawfulness of rates on such an arbitrary and imprecise criterion for determining just and reasonableness as "consumer expectations." Yet, that is precisely what the Commission's rate "benchmark" proposal contemplates. Implicit in this proposal is the assumption by the Commission that rate levels for 0+ services based on some sort of average of the rates of the "Big 3" interexchange carriers -- AT&T, MCI, and Sprint -- is what consumers expect and, therefore, what may be charged by carriers. Those carriers

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[11]47 U.S.C. § 151 *et seq.*

[12]47 U.S.C. § 201(b).

[13]47 U.S.C. § 202(a).

[14]See, *e.g.*, American Television Relay, Inc., 63 FCC2d 911, ¶ 36 (1977) and cases cited therein.

[15]See, *e.g.*, Private Line Rate Structure and Volume Discount Practices, 97 FCC2d 923, at ¶ 23, n. 53 (1984).

whose rates are within that consumer expectation-based cap may freely charge those rates and complete calls without providing any rate information Those carriers whose rates exceed that cap would be required to announce their rates at the outset of each call.

By requiring some providers of 0+ services to announce rates at the beginning of each call while permitting other 0+ service providers not to make such announcements, the Commission unquestionably would be limiting the ability of those carriers subject to the announcement requirement to charge rates above the cap -- irrespective of their cost of service. In other words, under the Commission's proposal a carrier offering 0+ service could be charging rates which are wholly cost-justified and fully compliant with the statutory standards of rate lawfulness codified at Sections 201(b) and 202(a) of the Act, yet would be required, unlike its competitors, to make harmful rate announcements simply because those lawful rates happened to exceed a Commission-mandated threshold based on the Commission's perception of consumer "expectations."

As stated above, what rates the "Big 3" carriers charge may not bear any relevance to the lawfulness of other providers' rates based upon those other providers' costs and other competitive circumstances Moreover, any attempt by the Commission to establish a rate standard based on the Commission's perception of what consumers expect to pay will be inherently arbitrary and will necessitate that the Commission engage in "guesswork" of its own. There probably will not be consensus among consumers as to their price expectations. Different consumers "expect" different rates. The implausibility of establishing rate benchmarks based upon customer expectations is demonstrated by the record already established in this proceeding. As noted in the Second Further Notice, in an earlier stage of this proceeding, a coalition led by the Competitive Telecommunications Association (CompTel) offered its own specific rate cap

proposal based on its perception of what rates consumers reasonably could expect to pay.[16] Notwithstanding CompTel's assertion that its proposed rate cap is below the level that generated "virtually all complaints," the National Association of Regulatory Utility Commissioners (NARUC) objected to the CompTel proposal on the basis that the proposed rate cap is "excessively high."[17] Apparently, NARUC believes that consumers "expect" lower rates than the CompTel coalition believes consumers expect The point is not whether CompTel or NARUC correctly perceives consumer expectations, but rather that consumers and groups purporting to represent constituencies which include consumers may -- and will -- disagree as to what rates consumers "expect" to pay. Rates that meet some consumers' expectations may not meet other consumers' expectations, and any attempt by the Commission to establish a rate "benchmark" triggering certain disclosure requirements based on a consumer expectation-based cap will be arbitrary and futile.

Moreover, the instant proposal to subject non-dominant carriers to a *de facto* rate cap is thoroughly contrary to more than fifteen years of unwavering Commission policy that non-dominant carriers' (*i.e.*, carriers which are unable to exercise market power) rates are presumptively lawful and therefore should be subject to streamlined regulation. In 1980, the Commission determined that carriers which do not have large market shares, which do not control bottleneck facilities, and which are unable to price above cost without loss of business are non-dominant.[18] More recently, the Commission specifically has concluded that resale

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[16]The CompTel rate cap proposal is described at ¶ 11 of the Second Further Notice.

[17]Letter from James Bradford Ramsey, Deputy Assistant General Counsel, NARUC, to Kathie Levitz, Deputy Chief, Common Carrier Bureau, dated November 9, 1995, as quoted at Second Further Notice, *supra* at ¶ 12.

[18]Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (*First Report and Order*), 85 FCC2d 1 (1980).

carriers which offer 0+ services (including so-called "operator service providers" or "OSPs") are non-dominant carriers and are properly subject to the streamlined regulatory requirements applicable to non-dominant carrier rates.[19]

As non-dominant carriers, those carriers' rates are presumptively lawful. Indeed, in the one and one-half decades following promulgation of the streamlined regulatory requirements, including tariff requirements, for non-dominant carriers, not a single non-dominant carrier's rate ever has been determined by the Commission to be unlawful.

Ironically, all three of the "Big 3" carriers whose rates the Commission proposes to use as a basis for establishing the rate "benchmark" for all other providers of 0+ services are themselves "non-dominant" carriers. Even AT&T with a dominant market share of the operator-assisted calling market has been classified as a non-dominant carrier.[20] As non-dominant carriers, each of the "Big 3," including AT&T, may change its rates without limitation on one day's notice and the rates of each of those carriers are presumptively lawful. As a result, the "Big 3" carriers would have carte blanche to raise or lower the benchmark rates against which their competitors' rates are to be judged without their own rates being subject to any scrutiny whatsoever. As proposed by the Commission, if Oncor's rates exceed 115 percent of the average rate of the "Big 3" it would be subject to mandatory rate disclosure. Yet AT&T, with its market share well in excess of 60 percent, could increase its 0+ rates by 100 percent, thereby significantly raising the benchmark, and not have to make any rate disclosures.

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[19]Telecommunications Research and Action Center v. Central Corporation, 4 FCC Rcd 2157 (1989).

[20]Motion of AT&T to be Reclassified as a Non-Dominant Carrier, FCC 95-427, released October 23, 1995. Estimates of AT&T's share of the interstate operator service market submitted on the record in that proceeding range from 64 percent (*Id.* at ¶ 90) to 90 percent (*Id.* at ¶ 91).

Oncor notes that the Second Further Notice repeatedly references the rate proposal contained therein as a "benchmark" rather than a rate cap or rate ceiling, presumably because carriers subject to the "benchmark" would not be legally prohibited from charging rates above the benchmark level, but would "only" be required to make rate disclosure announcements. As a practical matter, subjecting carriers whose rates are above a specified level to a rate disclosure announcement requirement while allowing carriers whose rates are below that same level to withhold rate information until after the call has been completed and billed is tantamount to a legal prohibition. This is so because carriers would be unable to charge above "benchmark" rates without substantial loss of traffic irrespective of their costs, irrespective of the lawfulness of their rates. Callers hearing such announcements would hang up and either attempt to utilize other carriers or decide not to initiate calls at that time. To impose price disclosure requirements on some carriers but not on others competing in the same market so handicaps the former that they would have no choice but to charge rates at or below the benchmark level, even if those rates are below their costs. Government actions which either directly preclude or which have the effect of precluding regulated carriers from charging rates sufficient to recover their costs are unlawfully confiscatory.

By effectively dictating what rates carriers may charge, the Commission would be prescribing rates. The Commission's rate prescription authority is described and conditioned by Section 205(a) of the Act. That section states in relevant part as follows:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of the opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and

reasonable charge . . . to be thereafter observed.[21]

The Commission's rate prescription authority codified at Section 205 of the Act plainly requires both a full opportunity for hearing and a determination that a carrier's rates are in violation of the Act before the Commission may prescribe the rates which may be charged. A comparison of a carrier's rates with those of the "Big 3" is not a "full opportunity for hearing," and a determination that a carrier's rates may not meet consumer expectations does not constitute a determination that the rates violate the Act. Accordingly, establishment of rate benchmarks and imposition of a rate disclosure requirement based upon those benchmarks would constitute an unlawful prescription in violation of Section 205 of the Act.

II. Establishment of Rate Benchmarks and Imposition of Rate Disclosure Requirements Would Exceed the Commission's Authority Under TOCSIA

In 1990, Congress enacted legislation directed at the competitive 0+ calling segment of the interexchange market. TOCSIA (now codified at Section 226 of the Act) bestows upon the Commission specific legislative authority with regard to OSP rates.

That authority is not unlimited. Pursuant to Section 226(h)(2), the Commission is empowered to review the rates contained in informational tariffs of operator service providers and, if those rates appear to the Commission to be unjust and unreasonable, the Commission may require a carrier to do either or both of the following:

A) demonstrate that its rates and charges are just and reasonable,

B) announce that its rates are available on request at the beginning of each call.[22]

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[21]47 U.S.C. § 205(a) (emphasis added).

[22]47 U.S.C. § 226(h)(2)(A - B).

Significantly, the remedial authority afforded the Commission in TOCSIA is specific and is limited. It neither empowers the Commission to establish rate caps (whether or not the Commission chooses to call them "benchmarks") nor to require rate disclosure announcements. If Congress had intended to so authorize the Commission, it could have easily done so. The fact that Congress did specify several remedial steps which the Commission could take in response to rates which do not appear just and reasonable, and that those remedial steps exclude caps and rate disclosures indicates that the rate disclosure proposal contained in the Second Further Notice exceeds the Commission's authority under TOCSIA

III. Requiring Carriers Whose Rates are Above Commission-Set Benchmarks to Disclose their Rates Would Constitute Mandated Speech in Violation of the First Amendment

By requiring carriers whose rates exceed Commission-set benchmarks to announce their rates at the outset of calls, the Commission would be compelling those carriers to speak when those carriers' competitive interests would be best served by their not speaking. It has long been recognized that speech, including commercial speech, is entitled to First Amendment protection.[23] The First Amendment has never permitted the government to impose disclosure requirements on commercial speakers, absent a finding that such disclosure is necessary to avoid public deception or to serve some other substantial governmental interest.[24]

Mandatory rate disclosure for carriers whose rates are above Commission-prescribed rate

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[23]See, *e.g.*, Virginia State Board of Pharmacists v. Virginia Citizens Consumer Council, 96 S. Ct. 1817 (1976), Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985), Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

[24]Zauderer v. Office of Disciplinary Counsel, *supra* 105 S. Ct. at 2281 (regulation of commercial speech must be "reasonably related to the state's interest in preventing deception of consumers").

benchmarks is neither necessary to avoid public deception nor to serve any other substantial government interest. Unlike corrective advertising situations and other cases where government has been constitutionally permitted to mandate commercial speech, there has been no public deception with regard to 0+ calling rates. Whether or not some consumers have been charged rates higher than their expectations for 0+ calls, there has been no demonstration, nor even any allegation, that those charges have resulted from any public deception. On the contrary, TOCSIA and the Commission's rules require ample availability to the public of timely and accurate information regarding the identity of carriers providing 0+ service as well as information about the rates to be charged. Information and other consumer requirements applicable to all providers of 0+ services include the following:

1. Maintenance of informational tariffs on file with the Commission available for public inspection which contain the carriers' rates;

2. Recorded or live operator announcements on every call identifying the carrier as the presubscribed carrier from the phone being used by the consumer;

3. Placement by telephone aggregators (*e.g.* owners of public telephone locations, owners of private pay phones, owners of hotels, motels, institutions, and other premises where telephones are made available to the public) of signs at or near the telephones which identify the carrier and which provide instructions for obtaining rate information;

4. All aggregator telephones must be "unblocked," *i.e.* they must allow access to carrier access codes so that consumers may utilize their preferred carriers based on rates or other considerations.

In addition to the aforementioned statutory and regulatory provisions applicable to 0+ calling, consumers are well-informed about providers of operator-assisted services, their rates, and how to avoid carriers who charge higher than expected rates as a result of major advertising

and consumer education campaigns engaged in by the entities with the most direct interest in consumers having that information -- the carriers who want the operator-assisted calling business of consumers. In fact, the Commission has directed the largest provider of 0+ services -- AT&T -- to educate its customers in utilizing its services from public telephones.[25] As a result of those efforts, consumers are well-informed about dial-around calling (*e.g.* 1-800-COLLECT and 1-800-CALLATT, use of proprietary calling cards, etc.) as well as with such alternative calling means as prepaid calling cards.

Neither would any other substantial government interest be served by required rate disclosure announcements. There is no public safety or health threat related to 0+ calling rates. The rates which the Commission proposes to require disclosure of have not even been determined to be unlawful. As explained in Section I of these comments, the Commission long has held that in adjudicating the lawfulness of carrier rates, cost of service is the benchmark. Unless the Commission is able to conclude based on an evidentiary record in the context of a rate investigation that a specific carrier's rates are unlawful, subjection of that carrier's above consumer "expectation" rates to mandatory disclosure requirements would compel the carrier to speak in circumstances where it would prefer to remain silent and where it has a constitutional right not to speak. As the Supreme Court has stated, for corporations as well as for individuals, the choice to speak includes within it the choice of what not to say."[26]

Moreover, attempts by government to mandate speech regarding rates and costs

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[25]Billed Party Preference for 0+ InterLATA Calls (*Report and Order and Request for Supplemental Comment*), 7 FCC Rcd 7714 (1992) at ¶ 55.

[26]Pacific Gas and Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 16 (1985). See also Riley v. Federation for the Blind of North Carolina, 487 U.S. 781, 796 (1988) (". . . the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.) (emphasis original).

uniformly have been found to violate the First Amendment. For example, in Central Illinois Light Company, *et al* v. Citizens Utility Board, *et al*, 827 F.2d 1169 (Seventh Cir. 1987), the court found unconstitutional a forced access requirement which obligated an electric utility to include with its invoices messages of a consumer advocacy group regarding the utility's rates. Examples of such objectionable -- and constitutionally impermissible -- messages included "WARNING! This utility bill might be hazardous to your budget."[27]

While the precise issue in Central Illinois Light involved the lawfulness of Illinois' forced access statute, the more general proposition is relevant to the Commission's proposal. Except for situations where commercial speakers may be required to declare information about themselves to avoid deception, they may not constitutionally be required to carry messages which are biased against or contrary to the corporation's views or its business interests.[28] Certainly, rate disclosure requirements applicable to some companies but not others depending upon the Commission's opinion as to consumer rate expectations would have the effect of discouraging use of those companies' services and suggest that, in the opinion of the Commission, those rates are objectionable -- an opinion with which the subject companies may disagree.

Accordingly, the Commission's proposed rate "benchmark"/rate disclosure requirement would constitute mandated commercial speech in patent contravention of the First Amendment.

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[27]827 F.2nd at 1171 n. 2. Another objectionable message was "We don't have to tell you how much your electric, gas and phone bills have increased in recent years, and the sad truth is that there's no end in sight."

[28]*Id.* at 1173.

IV. If the Commission Deems Rate Announcements to be Necessary, They Should be Limited to Rate Availability Announcements and Should be Required for All 0+ Calls, Irrespective of Carrier and Irrespective of Rate Levels

As described above, the Commission's proposal to dictate to carriers that they announce their rates at the outset of calls would be government-mandated commercial speech in violation of the First Amendment. If, despite the aforementioned constitutional infirmity, the Commission nonetheless seeks to impose a rate information announcement requirement, then Oncor suggests that carriers only be required to announce at the outset of 0+ calls that "rates are available upon request," and that the rate availability announcement requirement be made applicable to all providers of 0+ services without regard to rate levels. A non-discriminatory, non-judgmental, non-prejudicial rate availability proposal is contained in the Second Further Notice.[29]

As the Commission acknowledges, customers may be unaware that 0+ calls made away from home may -- and usually are -- more expensive than 1+ calls made from their home.[30] Even a cursory review of the tariffed rates of all interexchange carriers which provide 1+ and 0+ services indicates that 0+ calls are more expensive. This is true for each of the "Big 3" as well as for other carriers. If, as the Commission suggests, consumers should be informed that 0+ calling rates are higher than 1+ rates that consumers may expect to be charged, then all 0+ service providers should be subject to the same requirement to provide rate availability information sufficient to correct consumer misunderstandings in this area.

Subjection of a rate availability announcement requirement to all 0+ calling would ensure that all consumers have the opportunity to ascertain the rates to be charged for the calls they plan to make before the calls are made and the charges are assessed. The requirement would

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[29]Second Further Notice, *supra* at ¶ 15

[30]*Id.*

also provide a mechanism for consumers to be educated that the rates for operator-assisted calls normally are higher than rates charged by their presubscribed carriers for 1+ or other direct dial services. Perhaps more importantly, an "across-the-board" rate availability announcement requirement would obviate the need for the Commission to engage in the legally dubious and inherently arbitrary task of establishing a rate "benchmark" based on some imprecise perception of customer expectations.

Oncor's rate availability announcement proposal differs somewhat from the across-the-board rate disclosure requirement proposed in the Second Further Notice. In Oncor's view, mandatory rate disclosure would be impracticable, if not impossible, to implement, and probably would not result in useful and timely rate information to consumers. When a 0+ call reaches an operator service provider's operator center, neither the caller nor the carrier know what the call duration will be. In many cases, the carrier will not know the terminating location of the call, nor will it know what services of the carrier the caller plans to utilize. An alternative would be for the Commission to require mandatory rate disclosures based on a standard assumed call (*e.g.* a five minute station-to-station interstate call charged to a local commercial credit card). That assumed call may -- and often will -- differ from the call which the consumer actually makes and for which it is actually billed. Inevitably, differences between the Commission's "assumed" call for rate disclosure purposes and the caller's actual call for billing purposes will lead to customer confusion, unfulfilled consumer "expectations," and ultimately, consumer complaints to the Commission. Thus, mandatory rate disclosure rather than mandatory rate availability announcements will perpetuate consumer rate complaints to the Commission rather than reducing such complaints which is one of the Commission's goals for this proceeding.

V. The Commission's Rate Benchmark Proposal is Inconsistent with Regulatory Forbearance and Would Preclude the Commission from Forbearing From Requiring Operator Service Informational Tariffs

In the Second Further Notice, the Commission asks whether it should exercise its authority to forbear from applying the TOCSIA informational tariff requirement.[31] Section 10 of the Communications Act, added to the Act by the 1996 Telecom Act, requires the Commission to forbear from applying any provision of the Act or any regulation to telecommunications carriers or services if the Commission determines that:

> 1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with, that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> 2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> 3) forbearance from applying such provision or regulation is consistent with the public interest.[32]

Whether or not this three-part test can be met, it should be recognized that TOCSIA has its own tariff forbearance provision. Section 226(h)(1)(B) authorizes the Commission four years following enactment of TOCSIA to waive the informational tariff requirement if it determines that such informational tariffs no longer are necessary to protect consumers from unfair or deceptive practices relating to their use of operator services,[33] and to ensure that consumers

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[31] Second Further Notice, *supra* at ¶¶ 38 - 44

[32] 47 U.S.C. 160(a).

[33] 47 U.S.C. § 226(d)(1)(A).

have the opportunity to make informed choices when making calls.[34]

There is ample basis to conclude that informational tariffs are not necessary to protect consumers against unfair or deceptive practices. The entire focus of the Second Further Notice is the Commission's concern about higher than expected rates for 0+ calls and the Commission's receipt of consumer complaints about higher than expected rates. Nothing in the Second Further Notice states or even implies that consumers have been victimized by unfair or deceptive practices. Similarly, consumers have every opportunity to make informed choices when making 0+ calls. TOCSIA and the Commission's rules require the identities of OSPs to be posted on phones made available by aggregators to the public; OSPs must identify (*i.e.* "brand") themselves at the outset of calls before charges are assessed; rates must be provided upon request. In addition to these legal and regulatory requirements designed to promote informed consumer choice, the Commission must recognize that the marketplace itself has stimulated informed decisionmaking by consumers. Major carriers, including the "Big 3" have expended considerable resources advertising why and how to utilize their services. Alternative calling arrangements including, e.g., 1-800-COLLECT and 1-800-CALLATT, are pervasively advertised, and consumers repeatedly are advised how to reach their preferred carriers. Based upon the foregoing, informational tariffs no longer are necessary.

However, the Commission should recognize that implicit in its rate benchmark proposal is the notion that the rates of the "Big 3" upon which the benchmarks are to be established must be contained in filed, publicly-available tariffs. Unless those carriers' 0+ rates are contained in tariffs on file with the Commission, there will be no public basis for determining the benchmarks or for modifying the benchmarks over time. Thus, a consequence of

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[34]47 U.S.C. § 226(d)(1)(B).

implementation of a rate benchmark proposal based upon the rates of other carriers, *i.e.* the "Big 3," is that it would impede and probably preclude the Commission from exercising its tariff forbearance authority, at least with respect to 0+ services.

Tariff forbearance for non-dominant carriers, both under Section 226 and under Section 10 of the Act, will have many pro-competitive public interest benefits. The Commission should not sacrifice its ability to take that deregulatory pro-competitive step simply to implement an unnecessary and ill-advised rate benchmark/rate disclosure requirement for non-dominant carriers providing 0+ services.

CONCLUSION

For the reasons discussed in these comments, the Commission should not adopt its proposal to establish rate benchmarks based on the rates of other carriers, and it should not require those providers of 0+ services whose rates exceed those benchmarks to disclose rates at the outset of each call. If the Commission concludes that rate announcements are necessary to protect consumers, then those announcements should be limited to rate availability upon request, and such announcements should be required of all carriers without regard to how certain carriers' rates compare with the rates of certain of their rivals.

Respectfully submitted,

ONCOR COMMUNICATIONS, INC.

Mitchell F. Brecher

FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, NW
Washington, DC 20036
(202) 939-7900

Its Attorneys

July 17, 1996

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CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Comments of Oncor Communications, Inc. On Second Further Notice of Proposed Rulemaking" in Docket 96-77, was served this 17th day of July, 1996, *via hand delivery*, upon the following

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

John B. Muleta
Chief, Enforcement Division
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

Michael Carowitz, Esq.
Enforcement Division
Federal Communications Commission
2000 M Street, N.W., Room 6008
Washington, D.C. 20554

Ms. Mary Beth Richards
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

Ms. Anna Gomez
Counsel to the Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

Antoinette R. Mebane

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Attachment A

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